No. 21053

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NESTOR YEROSTATHIS, aka NESTOR GEROSTATHIS,

Plaintiff-Appellant,

vs.

A. LUISI, LTD. and SHIPPING DEVELOPMENTS CORP.,

Defendants-Appellees.

APPELLEES' BRIEF

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APPELLEES' BRIEF

STATEMENT OF THE CASE

Appellant is a Greek seaman [Tr. 16]*. The vessel M.V. ARGO ELLAS is registered under the laws of the Kingdom of Greece [Tr. 16]. It is owned by Appellee SHIPPING DEVELOPMENTS CORP., a Panamanian corporation, with its principal office in Piraeus, Greece [Tr. 16]. Appellee A. LUISI, LTD. is a British corporation and is the general agent of SHIPPING DEVELOPMENTS CORP. [Tr. 16]. None of the shareholders of either SHIPPING DEVELOPMENTS CORP. or A.

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* References, unless otherwise noted, are to the Transcript of Record.

LUISI, LTD. are citizens of the United States, and neither Appellee has any office or other place of business in the United States [Tr. 36, 45].

On June 17, 1963, Appellant signed a Contract of Employment as Second Engineer with the vessel's agents at Piraeus, Greece [Tr. 39]. The Contract provided that for claims due to accident, "the Law Courts of Athens" would be "solely competent" [Tr. 16, 39]. He signed Ship's Articles in standard Greek form when he joined the vessel at Antwerp, Belgium on June 23, 1963 [Tr. 36]. The aforementioned Contract of Employment and Ship's Articles were both written in the Greek language [Tr. 16].

Appellant was injured while M.V. ARGO ELLAS was at Chittagong, Pakistan on October 8, 1963 [Tr. 16, 17]. On October 10, 1963, he was repatriated by air from Chittagong to Greece, where he underwent treatment at the expense of SHIPPING DEVELOPMENTS CORP. [Tr. 17].

RELEVANT STATUTE

28 U.S.C.A. Section 1404(a):

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

ARGUMENT

I

28 U.S.C.A. 1404(a) DOES NOT PRECLUDE A DISTRICT COURT FROM DISMISSING A LIBEL BROUGHT BY A FOREIGN SEAMAN.

Without exception, courts confronted with suits between foreigners have unanimously held that Section 1404(a) does not deprive a district court of its inherent power to decline jurisdiction and dismiss an action under the common-law doctrine of *forum non conveniens.* See *e.g. Zouras v. Menelaus Shipping Co.,* 336 F.2d 209 (1st Cir. 1964); *Koziol v. THE FYLGIA,* 230 F.2d 651 (2d Cir.), *cert denied,* 352 U.S. 827 (1956); *Industria E. Comercio de Minerios v. Nova Genuesis Societa,* 310 F.2d 811 (4th Cir. 1962); *Brillis v. Chandris (U.S.A.) Inc.,* 215 F. Supp. 520 (S.D.N.Y. 1963); *Hatzoglou v. Asturias Shipping Company, S.A.,* 193 F. Supp. 195 (S.D.N.Y. 1961).

A. Appellant's Authorities Do Not Support His Contention.

Appellant apparently misinterprets the Supreme Court, and consequently misleads this Court when he states that the Supreme Court in *Norwood v. Kirkpatrick,* 349 U.S. 29, "clearly held" that the remedy of dismissal "was eliminated" by the passage of Section 1404(a) [Appellant's Brief, page 4].

What apparently misled Appellant was the Court's language to the effect that the harsh consequence of dismissal — the only remedy available to a district court

before the passage of Section 1404(a) — was no longer required when the forum was inconvenient, since Section 1404(a) provided for the less severe penalty of transfer *where such transfer was possible.* In the sentence immediately following that portion quoted by Appellant, the Supreme Court said that by Section 1404(a) Congress "intended to permit courts to grant transfers upon a lesser showing of inconvenience." 349 U.S. at 32. However, the court did not say, nor even by the most stretched interpretation imply, that a district court *could not* dismiss an action where dismissal was appropriate. The court merely implied that a district court did not have to dismiss, but could instead transfer. To that extent, "the harshest result of the application of the old doctrine of *forum non conveniens,* dismissal of the action, was eliminated by the provision in Section 1404(a) for transfer." 349 U.S. at 32.

It was the *necessity* of dismissal, and not the *possibility,* of it, that was eliminated by Section 1404(a). The effect of Section 1404(a) on the common-law doctrine of *forum non conveniens* was succinctly stated by Danaher, C. J., in *Gross v. Owen,* 221 F.2d 94, 96 (D.C. Cir. 1955):

> "But, Appellants argue, section 1404(a) operates to *deprive* the District Court of power to dismiss when the doctrine of forum non conveniens is invoked. The law is exactly the reverse, for the statute took nothing from the courts. Rather it conferred a new and additional authority to transfer a proper case where previously the court had no alternative but to dismiss." (Citations omitted)

However, as expressly required by the terms of Section 1404(a), transfer is only available under certain circumstances — where there exists another district court where the action could have been brought. See *Hoffman v. Blaski,* 363 U.S. 335 (1960). In the instant case, no such district court exists. Thus, transfer is impossible, and the court is left with the common-law remedy of dismissal when the plaintiff has chosen a *forum non conveniens.*

On Pages 4 and 5 of Appellant's Brief it is stated that the "most persuasive and most authoritative decisions now agree that . . . dismissal as a remedy for forum non conveniens has been abolished." In support of this contention nine cases are cited. However, not one of the cases cited stands for the proposition urged by Appellant. None held, or even intimated, that dismissal as a remedy was abolished by Section 1404. Further, only *North Branch Products v. Fisher,* 284 F.2d 611 (D.C. Cir. 1960) dealt with facts even remotely similar to those with which this court is concerned, that is, where there existed no other Federal forum to which the case could be transferred. However, even *North Branch Products* does not support Appellant's contention, since that case arose under the United States Patent Acts and the court merely concluded that no "more suitable or convenient forum" existed, 284 F.2d at 613, and hence the district court should have retained jurisdiction over the patent claim. All of the other cases cited by Appellant concerned situations where there was a more convenient Federal forum available, where defendant had failed to satisfy its burden in showing that the forum selected by plaintiff was inconvenient, or where there was no juris-

diction over the defendant. In three of the cases defendant's motion to transfer was granted.

B. The Courts Are In Unanimous Agreement That Section 1404(a) Did Not Eliminate Dismissal As A Remedy For Forum Non Conveniens.

In addition to the cases cited by the Court below and by Appellees in their previous memoranda, most all of which Appellant attacks as not having considered the issue in question, the following cases have all either expressly decided or approvingly recognized the proposition that Section 1404(a) did not abolish dismissal as a remedy:[1]

De Sairigne v. Gould,
83 F.Supp. 270, 273 (S.D.N.Y. 1949):

> "The plaintiff insists, however, that Section 1404(a) of the new Judicial Code, 28 U.S.C.A. Section 1404(a) has codified the law of forum non conveniens so as to limit its application to cases which are capable of being transferred from one federal district to another . . . I think this contention is plainly unsound, for it would strip a federal court of its inherent power to refuse jurisdiction in cases which should not have been brought here but should have been brought in a foreign jurisdiction . . .

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[1] For other cases granting defendant's motion to dismiss under the doctrine of *forum non conveniens,* see *Hendricks v. Alcoa Steamship Co.,* 206 F.Supp. 693 (S.D. Miss. 1962); *LeClair v. Shell Oil Company,* 183 F.Supp. 255 (S.D. Illinois 1960); *Agrio v. Oceanic Operations Corp.,* 1962 A.M.C. 173 (S.D. N.Y.); *Industria E. Comercio de Minerios v. Nova Genuesis Societa,* 310 F.2d 811 (4th Cir. 1962).

There is nothing in the language or history of the section to indicate that Congress had any such intention."

Latimer v. S/A Industrias Reunidas F. Matarazeo,
91 F.Supp. 469, 471 (S.D.N.Y. 1950):

"Section 1404(a) has not limited the application of forum non conveniens to cases which are capable of being transferred from one Federal district to another. Otherwise, it would be a denial of Federal court's inherent power to refuse jurisdiction in cases which should not have been brought in the United States, but rather in the courts of a foreign jurisdiction."

Vanity Fair Mills v. T. Eaton Co.,
234 F.2d 633, 645 (2nd Cir. 1956):

"The doctrine of forum non conveniens is now firmly established in federal law. (Citations omitted). 28 U.S.C. Section 1404(a) has, in effect, codified and replaced this doctrine whenever the more convenient tribunal is a United States District Court where the action 'might have been brought.' (Citation omitted.) But the federal courts retain the inherent power to refuse jurisdiction of cases not within section 1404(a) — cases which should have been brought in a foreign jurisdiction, rather than in the United States."

Glicken v. Bradford,
204 F.Supp. 300, 304 (S.D.N.Y. 1962):

"However, despite the statutory embodiment of the rule (of forum non conveniens), there are cases

where the court may still properly apply the doctrine; for example, where the action should have been brought outside of the United States (citations omitted) or where transfer could be effected only to a state court and not to a district court, so that section 1404(a) could not possibly be applicable."

Ciprari v. Servicos Aereos Cruzeiro do Sul, S.A. (Cruzeiro), 232 F.Supp. 433, 442 (S.D.N.Y. 1964):

"Dismissal on *forum non conveniens* grounds is not an impossibility when the action should have been brought outside the United States."

II

THE COURT BELOW PROPERLY DECLINED TO EXERCISE ITS DISCRETIONARY JURISDICTION

A. If The Maritime Law of The United States Does Not Apply, Jurisdiction Was Properly Declined.

Referring to the trial court's unqualified discretion to dismiss admiralty suits between foreigners, the Supreme Court in *Canada Malting Co. v. Patterson Steamships Ltd.,* 285 U.S. 413, 420 (1932) referred to its holding in *Langhes v. Green,* 282 U.S. 531 (1931), and held:

" 'Admiralty courts . . . have complete jurisdiction over suits of a maritime nature between foreigners. Nevertheless, "the question is one of discretion in every case and the court will not take cognizance of the case if justice would be as well done by remitting the parties to their home forum". The Maggie Hammond, 9 Wall 435, 457 The Belgen-

land 114 U.S. 355, 368, Charter Shipping Co. v. Bowring, Jones and Tidy, 281 U.S. 515, 517.' "

It is well recognized that justice is best accomplished by remitting the parties to the forum whose laws are applicable. This principal was recognized by the Second Circuit Court of Appeals when it approved a declination of jurisdiction by saying:

> "There is no ground for holding the trial judge in error in his conclusion that, since the Swedish law so directly controls, the libellant's rights would be adequately, if not better, adjudicated in Swedish tribunals." *Koziol v. THE FYLGIA,* 230 F.2d at 652.

B. The Maritime Law Of The United States Does Not Apply.

In *Lauritzen v. Larsen,* 345 U.S. 571, 97 L.Ed. 1257 (1952), the Supreme Court succinctly listed the connecting factors which must be considered as significant in determining the law applicable to a maritime tort. The factors listed by the Court were as follows: Place of the wrongful act; Law of the flag; Domicile of the injured; Allegiance of the defendant shipowner; Place of contract; Accessibility of foreign forum; and, Law of the forum.

An application of the Supreme Court's test to the facts in this case clearly reveals an overwhelming preponderance in favor of Greek Law.[2]

C. The "Flag Of Convenience" Doctrine Is Inapplicable.

On page 18 of his brief, Appellant states that "it is obvious that the flag and corporate ownership of the vessel herein are registrations and incorporations 'of convenience' ", and that British, not Greek, law should apply. Appellant's attempt to bring this case within the "flag of convenience" doctrine first enunciated by *Bartholomew v. Universe Tank Ships, Inc.*, 263 F.2d 437 (2nd Cir.), *cert denied,* 359 U.S. 1000 (1959), must fail for several reasons.

First, the "flag of convenience" doctrine originated as an attempt to limit the dominating importance of the law of the flag which was recognized by the Supreme Court in *Lauritzen v. Larsen, supra.*[3] The purpose of

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[2] Appellant was injured in Pakistan. The vessel is registered in Greece and is manned by Greek subjects. The Appellant is domiciled in Greece. The vessel is owned by a Panamian corporation with its principal office in Piraeus, Greece. The corporation is owned by Greek citizens. Appellant's Contract of Employment was signed in Greece, was written in Greek and provided that only Greek courts would be competent to litigate claims arising from an accident or illness. Appellant does not contend, nor do the facts permit a contention, that Greek courts are inaccessible to Appellant. As evidenced by *Lauritzen,* it is not contrary to the laws or public policy of the United States to remit injured foreign seamen to their home forum.

[3] In *Lauritzen,* the court said: "Perhaps the most venerable and universal rule of maritime law . . . is that which gives cardinal importance to the law of the flag." 345 U.S. at 584.

the doctrine was solely to establish an approach for deciding whether a seaman's claim was to be governed by the law of the United States or by the law of the flag flown by the vessel, and to determine whether the vessel owner sought to circumvent United States' law by obtaining foreign registry. The doctrine is clearly inapplicable to a case, such as this one, where Appellant concedes that United States law does not apply [Tr. 4; Appellant's Brief 2, 18].

Second, even if the doctrine is applicable, it would not affect the court's decision since there is a conspicuous absence of any contacts betwen the transaction involved and the United States. Third, the argument for application of British law should be addressed to the British courts whose concern with such charges would be paramount. Fourth, the claim for application of British law is itself a strong argument in support of the court's declination of jurisdiction, since by declining jurisdiction the court allows the plaintiff to bring his action in the foreign forum he believes appropriate and whose law he wants applied. Therefore, even if English law was applicable (an unwarranted assumption in view of the absence of significant contacts with England), this would certainly not be a factor which should compel a U. S. District Court to entertain jurisdiction.

In *Tjonaman vs. A/S GLITTRE,* 340 F.2d 290 (2nd Cir.), *cert. denied,* 381 U.S. 925, *rehearing denied,* 382 U.S. 873 (1965), the Second Circuit discussed the "flag of convenience" doctrine it had earlier originated. In that case, a Dutch national and legal resident alien of the United States signed on as a member of a Norwegian

owned and registered vessel. He had signed standard form Norwegian Shipping Articles, and was injured about a month later when the vessel was in Ghanian waters. The Second Circuit affirmed the dismissal of the libel and held that the district court correctly ruled that Norwegian law applied and that the libelant should have sought relief in Norwegian, and not American, courts.

D. Greece Is The Most Convenient Forum.

Immediately following his accident, Appellant was repatriated by air to Greece [Tr. 16, 17]. Upon his arrival at Greece he was met by a Greek doctor who immediately performed an operation [Tr. 17]. All maintenance and expenses thereof were paid by Appellees [Tr. 17]. In view of these circumstances, the comments of the court in *Giatilis v. S/T DARNIE,* 171 F.Supp. 751 (S.D. Maryland, 1959) are of interest. In that case, a Greek seaman aboard a Liberian vessel was injured outside the three mile limit of the Florida coast. He libeled the ship for personal injuries, and subsequently added a claim for wages due. In declining jurisdiction of his personal injury claim, the court said:

> "Most of the witnesses on the issues of unseaworthiness, negligence, failure to supply medical attention on the ship, and libelant's present condition are Greeks, living in Greece or employed on ships all over the world. Most of them speak Greek and not English. It is obvious that testimony, in court or by deposition of Greeks questioned by Greeks in Greek, will be better understood by a Greek Judge than translations of such testimony would be understood by this court. Moreover, the important wit-

nesses will not be subject to process issuing out of this court; many of them will be subject to process in Greece." 171 F.Supp. at 754.

In the instant case, all of the witnesses, both as to the accident itself and as to the extent of Appellant's damages will be Greek. The cost and inconvenience attendant to both the court and to Appellees, all of which the court can judicially notice, are sufficient considerations to justify this court in declining jurisdiction on the grounds of *forum non conveniens.*

E. Appellant Agreed To Have His Rights Determined by Greek Courts According To Greek Law.

An independent reason for declining jurisdiction in this case, apart from the doctrine of *forum non conveniens,* is that Appellant signed a written contract with Hellenic Marine Agencies "as agents of the M.V. ARGO ELLAS" which expressly stipulated that all terms of his employment would be governed by the Greek collective agreement and that the courts of Athens would be solely competent [Tr. 39]. This contract was freely entered into by both parties and is fully enforceable under its clear and unambiguous terms. The agreement and each of its provisions should be recognized and effectuated by this court.

In *Hatzoglou v. Asturias Shipping Company, S/A, supra,* the court declined jurisdiction and made the following comments about a similar contract between a seaman and the vessel owners at Piraeus:

"An agreement by a Greek chief officer, signed in Greece, written in Greek, to apply Greek law is

fully valid. See *Lauritzen v. Larsen,* 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254, upholding a similar agreement where the American contacts were far more numerous than in the case at bar." 193 F.Supp. at 197.

F. The Case Law Clearly Supports A Declination Of Jurisdiction.

A case which is factually similar to the case at bar where the court declined to exercise its jurisdiction on the grounds of *forum non conveniens* and on the additional ground that the plaintiff had agreed to look to Greek law is *Brillis v. Chandris (U.S.A.), Inc.,* 215 F.Supp. 520 (S.D.N.Y. 1963). In *Brillis,* the plaintiff was a subject and resident of the Kingdom of Greece. While at Piraeus, Greece, he agreed to serve on board a Liberian vessel, and signed an employment contract to this effect with a Greek corporation not a party to the suit but who was acting as agent for one of the defendants. The agreement provided that any disputes arising from the contract would be governed exclusively by Greek law, and that the courts of Greece would have exclusive jurisdiction. Plaintiff subsequently joined the vessel and signed ship's articles in France. While the vessel was proceeding from Yokohama, Japan, to San Pedro, California, the plaintiff was injured. Upon his arrival at San Pedro, California, he was repatriated to Greece. Plaintiff set up causes of action under United States, Panamanian and Liberian law. The defendants urged three grounds for dismissal: (1) Inapplicability of the Jones Act; (2) An agreement to look to the courts of Greece; and (3) *Forum non conveniens.* The court

carefully analyzed the facts of the case, agreed with each of defendant's grounds for dismissal, and then dismissed the libel.[4]

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[4] "The wrongful act was committed on the high seas; the ship flies the flag of Liberia; the injured owes allegiance to Greece; the allegiance of the owner is foreign no matter which defendant is deemed the true owner . . . ; the employment contract was executed in Greece and the Ship's Articles signed in France. . . .

"Viewing all the contacts of this maritime tort, both with the United States and foreign states, and giving each its appropriate weight and significance, it is clear that such contacts as there are with the United States are at best minimal and thus insufficient for the application of the Jones Act. (Citations omitted.)

"The second defense raised by defendants seeks to invoke the doctrine of *forum non conveniens* and is addressed to the discretion of the Court. It is unnecessary to set forth anew the factual grounds upon which the Jones Act was found to be inapplicable. All are relevant in determining whether to retain jurisdiction over this controversy. In addition, several other matters may here be given weight which are inappropriate in the context of the Jones Act. (Citation omitted.)

"These additional considerations consist of the following: Plaintiff is Greek and does not speak English. All witnesses to the accident are likewise Greek, residing in that country and speaking only Greek. . . .

"In a situation factually similar to the instant one, the court of appeals of this circuit said: 'It is prima facie undesirable that an overburdened district court should conduct a trial in a personal injury action between foreigners, with all the evidence on the issue of liability and much of the evidence on damages given in a foreign tongue by witnesses equally or more available in the foreign forum, and with reliance having to be placed on expert testimony as to the governing law, when, as here, an adequate remedy is available in the country where both parties reside and to which the plaintiff will return.' *Conte v. Flota Mercante Dell Estado,* 277 F.2nd 664, 667 (2nd Cir. 1960).

"It should be pointed out that the employment contract signed by the plaintiff agreeing to look solely to Greek courts

Another recent case in which a Greek seaman was remitted to the courts of Greece, was *Zouras v. Menelaus Shipping Co., Ltd.,* 336 F.2nd 209 (1st Cir. 1964).[5] In *Zouras,* a Greek seaman on a Liberian flag vessel owned by a Liberian corporation was injured while the vessel was anchored in Boston harbor in the course of a voyage from Italy to Japan. He was taken to the United States Public Health Service Hospital in Boston for treatment and was then repatriated to Greece. The court reviewed the facts and held:

> "The libellant is a Greek citizen residing in Greece who has returned to his native country. Moreover the law of the parties' choice is that of Greece, and, for what it may be worth, that was the place of contracting. On the facts of this case we cannot see that any injustice whatever would result in relegating the libellant to his home forum for determinaiton of whatever legal rights he might have." 336 F.2d at 211.

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and Greek law is fully valid. The American contacts must be substantial before a court will declare such an agreement void as against public policy. (Citing *Lauritzen v. Larsen* and *Hatzoglou v. Asturias Shipping Co., supra.*).

"In light of all the factors discussed above, it is evident that this court should exercise its discretion and decline jurisdiction on the grounds that this district is not the proper forum and Greece is. Plaintiff may then look to a Greek tribunal and Greek law as he agreed to when he accepted employment on the ANGELIKI II." 215 F.Supp. at 522, 523, 524.

[5] *Accord, Hatzoglou v. Asturias Shipping Company, S.A., supra,* where the court declined jurisdiction of a libel brought by a Greek national against a Panamanian corporation.

Also recognizing the principle that the district court should refuse jurisdiction in admiralty suits between foreign nationals is *Koziol v. THE FYLGIA* 230 F.2d 651, (2nd Cir. 1966). In that case a Polish merchant seaman signed shipping articles in Argentina to serve aboard a Swedish vessel, and was injured while at sea. The Second Circuit affirmed the district court's dismissal on the ground that since the Swedish law so directly controlled, the plaintiff's rights would be better adjudicated in Swedish tribunals.

Thus, those cases which the court should look to for guidance — cases involving claims by foreigners against foreigners for injuries arising on the high seas — are unequivocal in their unanimous conclusion that justice is best effectuated by relegating the plaintiff to his home forum. This Court should, as have the other circuit courts that have decided the issue, make it clear that district courts are not the appropriate forum for suits between foreigners residing and incorporated in foreign jurisdictions.

G. Practical Considerations Justify A Declination Of Jurisdiction.

If this court establishes a policy of accepting jurisdiction in cases of this type, the end result will be that a seaman of any country will have only to obtain service over a defendant vessel owner in the United States in order to bring his action. Our courts, the dockets of which are already crowded, will then have the problem of determining what nation's laws to apply, interpreting that nation's laws, and then applying it.

The possibility of a court calendar congested with suits between foreigners for personal injuries received aboard foreign flag vessels should be avoided. Thus, for this additional reason, jurisdiction in this case should be declined.

CONCLUSION

The District Court properly exercised its discretion in declining jurisdiction in this case. The decision should be affirmed.

Respectfully submitted,

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CERTIFICATE OF FILING ATTORNEY

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

_____

KENNETH R. CHIATE

Subscribed and sworn to
before me this day of
1967

_____

Notary Public in and for
said County and State